Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

No. 08-148

In the Supreme Court of the United States

DAVID E. MARTINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's conviction for conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), was invalid because the financial transactions alleged to have constituted promotion money laundering involved payment of expenses of the proceeds-generating offense.

2. Whether, in calculating the "value of the funds" for purposes of determining petitioner's offense level under Sentencing Guidelines § 2S1.1 (2000) for money laundering conspiracy, the district court erroneously counted funds used in transactions that did not involve profits from the underlying offense.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Anker Energy Corp. v. *Consolidated Coal Co.*, 177 F.3d 161 (3d Cir.), cert. denied, 528 U.S. 1003 (1999) 10

Bousley v. *United States*, 523 U.S. 614 (1998) 8

Gregg v. *Georgia*, 428 U.S. 153 (1976) 9

Grutter v. *Bollinger*, 539 U.S. 306 (2003) 9

King v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991), cert. denied, 505 U.S. 1229 (1992) 10

Marks v. *United States*, 430 U.S. 188 (1977) 9

Nichols v. *United States*, 511 U.S. 738 (1994) 9

United States v. *Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003) 10

United States v. *Barrios*, 993 F.2d 1522 (11th Cir. 1993) 13

United States v. *Booker*, 543 U.S. 220 (2005) 5

United States v. *Johnson*, 467 F.3d 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007) 10

United States v. *Santos*, 128 S. Ct. 2020 (2008) 7, 9, 10, 11

Statutes and guidelines: Page

18 U.S.C. 1955 ..... 7, 9
18 U.S.C. 1956 ..... 4, 8
18 U.S.C. 1956(a)(1) 4, 6, 7, 8
18 U.S.C. 1956(a)(1)(A)(i) 8, 9
18 U.S.C. 1956(h) 2, 4
18 U.S.C. 3553(b) (2000) 5
28 U.S.C. 2255 8
United States Sentencing Guidelines:
§ 2B1.1 14
§ 2S1.1 (2000) 8
§ 2S1.1 13
§ 2S1.1, comment. (n.1) 14
§ 2S1.1(a) 14
§ 2S1.1(b)(2) (2000) 6, 12, 13
§ 2S1.1(b)(2)(i) (2000) 5
§ 3B1.1(a) 5
App. C, amend. 634 13

In the Supreme Court of the United States

No. 08-148

DAVID E. MARTINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter but is available at 265 Fed. Appx. 784. An earlier opinion of the court of appeals (Pet. App. 13-62) is reported at 454 F.3d 1300.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2008. A petition for rehearing was denied on May 5, 2008 (Pet. App. 65-66). The petition for a writ of certiorari was filed on August 4, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was con-

victed of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 13. He was sentenced to 210 months of imprisonment. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. *Ibid.* This Court denied a petition for a writ of certiorari. *Id.* at 64. On remand, the district court reimposed the 210-month sentence, and the court of appeals affirmed. *Id.* at 1-12.

1. The evidence at trial showed that, in 1995, petitioner and others formed Global Business Services, Inc. (GBS), a corporation ostensibly in the business of facilitating the sale of small businesses by putting sellers in contact with buyers. GBS told potential sellers that it would advertise in national publications that it had businesses for sale. When interested buyers responded, GBS would attempt to match them with compatible sellers. Each seller was required to pay a percentage of the total value of his business in exchange for the advertising, as well as an additional fee if the business actually sold. Pet. App. 14.

GBS made numerous misrepresentations to its clients. For example, GBS sent direct mailings to small-business owners with testimonials from allegedly satisfied customers describing how GBS had helped sell their businesses, when in fact there were no such customers. GBS represented in its mailings that all of its prospective buyers were prequalified to ensure that they had the financial ability to purchase a business, when in fact that screening was discontinued soon after GBS was formed. GBS represented to clients that it used a sophisticated computer matching system to bring compatible buyers and sellers together, when in fact it had no computers. Pet. App. 15.

Many of GBS's clients never received any "match" at all, and those who did often found that the person purportedly interested in their business did not exist, had never heard of GBS, had no interest in buying a business, or was interested in a wholly unrelated type of business. GBS gave sellers contact names of fictitious GBS employees, and petitioner placated complaining clients by sending them bogus "matches." Petitioner personally wrote many of the fraudulent mailings; employed fake names in GBS correspondence to conceal his role in the operation and to make it appear that GBS had a large workforce; and falsified documents submitted to the Better Business Bureau. Between 1995 and 2000, GBS arranged the sale of only one business. Pet. App. 16-18.

When a seller made payment after signing a contract with GBS, GBS generally deposited the money in one of several GBS-controlled bank accounts. Between 1995 and 2000, GBS deposited approximately $6.6 million into those bank accounts. The fraudulently obtained money in the GBS-controlled accounts was used to pay the expenses of the scheme and to enable its expansion—*e.g.*, to pay for more fraudulent brochures and mailings, which were used to solicit new clients and thus to generate additional illegal receipts. Petitioner and his family also used funds in the GBS accounts for personal expenditures, such as clothing and cellular phone service. In addition, GBS credit cards were used to pay personal expenses for petitioner's family. Pet. App. 18-19; Gov't C.A. Br. xvii (04-13977).

Petitioner also used bank accounts in the name of the fictitious "A-O Trust" to receive some client payments, pay expenses of the fraudulent scheme, and fund personal expenses, such as meals and jewelry. Pet. App. 18

n.4. In addition, each month, petitioner retained between $4000 and $5000 worth of the sellers' checks, cashed them, and used the money for his personal expenses. Gov't C.A. Br. 29 (07-11225).

Petitioner moved funds among the various accounts to create the false impression that some of the funds represented loans to and from GBS. In one instance, for example, GBS funds were deposited into a trust fund controlled by petitioner, withdrawn via a check made out to cash, converted into a cashier's check, and then redeposited into a GBS account as the proceeds of a "loan." Pet. App. 18-19.

2. Section 1956(h) of Title 18 of the United States Code makes it a crime to conspire to violate the substantive provisions of 18 U.S.C. 1956. Section 1956(a)(1), in turn, makes it a crime, "knowing that a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] * * * a financial transaction which in fact involves the proceeds of specified unlawful activity," either "with the intent to promote the carrying on of specified unlawful activity," or "knowing that the transaction is designed in whole or part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. 1956(a)(1).

Petitioner was charged with and convicted of conspiring to commit both promotion and concealment money laundering. Indictment 4. The financial transactions supporting the promotion object of the conspiracy included the payment of GBS's expenses using revenue from the fraudulent scheme. See *id.* at 6-15. The financial transactions supporting the concealment object of the conspiracy included the deposits into and out of the fictitious "A-O Trust," as well as transactions into and

out of various other GBS accounts designed to generate the fictitious loans. See *ibid.*

3. Petitioner's initial sentencing took place before this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). Using the 2000 edition of the Federal Sentencing Guidelines Manual, the district court assigned petitioner a base offense level of 23 under Sentencing Guidelines § 2S1.1. The court added eight levels because the "value of the funds" involved in petitioner's offense exceeded $6 million. See Sentencing Guidelines § 2S1.1(b)(2)(i) (2000). The court added an additional four levels for petitioner's aggravating role in the offense. See *id.* § 3B1.1(a). Based on the resulting total offense level of 35 and petitioner's criminal history category of II, petitioner's sentencing range under the Guidelines was 188 to 235 months. Treating the Guidelines as mandatory pursuant to 18 U.S.C. 3553(b) (2000), the district court sentenced petitioner to 210 months of imprisonment. See Gov't C.A. Br. 8-9, 14 (07-11225).

4. As relevant here, petitioner contended on appeal that the district court had erroneously refused to instruct the jury that paying for "legitimate business expenses," such as salaries, taxes, and rent, "does not amount to 'promoting the carrying on of specified criminal activity.'" Pet. App. 48-49. The court of appeals rejected that argument. *Id.* at 48-51.

The court of appeals observed that, when a business as a whole is illegitimate, even expenditures that are not intrinsically unlawful can support a promotion money laundering charge. Pet. App. 49. The court, however, declined to decide whether petitioner's proffered instruction was a correct statement of the law, because the court concluded that other instructions adequately conveyed the same point. *Id.* at 50. The court explained

that the district court had correctly instructed the jury that, to constitute money laundering, a financial transaction had to be conducted or attempted with the intent to promote the fraudulent scheme. *Id.* at 51. Based on those instructions, the court of appeals reasoned, the jury could not have found petitioner guilty under the promotion theory if it believed that the financial transactions consisted of the payment of "legitimate, non-fraudulent business expenses." *Ibid.* Petitioner made no argument based on the meaning of "proceeds" under the money laundering statute, 18 U.S.C. 1956(a)(1), and the court of appeals did not address that issue.

Although the court of appeals upheld petitioner's conviction, it vacated his sentence and remanded for resentencing. Pet. App. 53-54. The court held that the district court had acted in contravention of this Court's decision in *Booker* when it had enhanced petitioner's sentence under the then-mandatory Sentencing Guidelines based on facts neither admitted by petitioner nor found by the jury. Pet. App. 52-53.

5. After the district court reimposed the same 210-month sentence on remand, this time treating the Guidelines as advisory only, petitioner appealed the new sentence. As relevant here, petitioner contended that the district court had erred in calculating the "value of the funds" under Sentencing Guidelines § 2S1.1(b)(2) (2000). Pet. App. 2. In particular, petitioner argued that the court incorrectly based the calculation on *all* the money fraudulently obtained, including money used to pay "legitimate[]" expenses of GBS. *Ibid.* The court of appeals rejected petitioner's argument. *Id.* at 2-6.

The court of appeals held that, under the applicable 2000 edition of the Sentencing Guidelines manual, the "value of the funds" was not limited to "laundered

funds," but included funds derived from "all acts and omissions committed by [petitioner] during the commission of the offense." Pet. App. 6. The court concluded that the district court did not "clearly err" in calculating the "value of the funds" as $6.1 million because that "entire amount was indisputedly involved in the course of the criminal conduct." *Id.* at 5-6. The court rejected petitioner's claim that his 210-month sentence was unreasonable. *Id.* at 9-12.

6. Following the decision in petitioner's second appeal, this Court held in *United States* v. *Santos*, 128 S. Ct. 2020 (2008), that, to establish promotion money laundering in violation of Section 1956(a)(1) based on a transaction involving the "proceeds" of an illegal gambling business, in violation of 18 U.S.C. 1955, the government must prove that the transaction involved the profits, rather than the gross receipts, of the business. Thereafter, petitioner filed a motion in the court of appeals to recall the mandate in light of *Santos*. Pet. App. 72-78. The court of appeals denied the motion. *Id.* at 63. The court stated that "[petitioner's] conviction was final at the time that *Santos* issued and the only question decided by this Court is whether his sentence on remand was reasonable." *Ibid.*

ARGUMENT

In this Court, petitioner now relies on *Santos* (Pet. 7-9) to challenge both his conviction and sentence. Petitioner contends that his conviction was invalid because the alleged promotion transactions consisted of the payment of the expenses of his fraudulent scheme and therefore were not transactions in profits from the scheme, as required by *Santos*. Pet. 8. As for his sentence, petitioner contends that in determining the "value

of the funds" for purposes of Sentencing Guidelines § 2S1.1 (2000), the district court erroneously counted funds that petitioner used to pay his business expenses, such as salaries, taxes, and utilities, because those funds were not laundered under *Santos*. Pet. 8. Those challenges are not properly raised in this Court, and they lack merit in any event. Accordingly, the Court should deny the petition for a writ of certiorari.

1. a. Petitioner did not properly preserve for this Court's review any challenge to his conviction based on the meaning of "proceeds" in 18 U.S.C. 1956(a)(1), which was at issue in this Court's decision in *Santos*. Petitioner argued in the courts below that paying the expenses of his fraudulent enterprise did not constitute promotion money laundering because the payment of legitimate business expenses does not "promote the carrying on specified unlawful activity" as required by 18 U.S.C. 1956(a)(1)(A)(i). See Pet. App. 48-51. He did not make any argument based on the meaning of the term "proceeds" in Section 1956(a)(1), and the court of appeals did not address that issue. That default should preclude review here. If petitioner believes that his conduct did not amount to money laundering in light of *Santos*, then his proper recourse is to file a motion for collateral relief from his conviction and sentence under 28 U.S.C. 2255, where he could attempt to make the factual showing of actual innocence necessary for him to overcome his procedural default. Cf. *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998).

b. In any event, petitioner's reliance on *Santos* is unavailing. Contrary to petitioner's suggestion (Pet. 7), *Santos* did not hold that "proceeds" universally means "profits" in Section 1956. No opinion spoke for a majority of the Court in *Santos*. The result in *Santos* was

that, in order to establish a violation of 18 U.S.C. 1956(a)(1)(A)(i) in which the government alleges that the defendant laundered the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, the government must prove that the alleged laundering transactions involved the profits, rather than the gross receipts, of the business. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Because of the fractured nature of the decision, however, *Santos* does not resolve the question whether the government was required to prove that the financial transactions underlying petitioner's money laundering conviction involved profits, because petitioner's conviction rests on a different predicate "specified unlawful activity" (SUA) (mail fraud rather than operating an illegal gambling business). *Santos* does not address the meaning of "proceeds" in those circumstances.

The general rule for ascertaining the holding of a case in which there is no majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)). As this Court has recognized, however, the *Marks* test is frequently "more easily stated than applied." *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003); *Nichols* v. *United States*, 511 U.S. 738, 745-746 (1994). In some cases, there may be "no lowest common denominator or 'narrowest grounds' that represents the Court's holding." *Ibid.* (concluding that it was "not useful to pursue the *Marks* inquiry").

When there is no "one opinion [that] can meaningfully be regarded as 'narrower' than another" in the sense that it is a "logical subset of other, broader opin-

ions," the traditional *Marks* analysis does not apply. *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992)); *e.g.*, *United States* v. *Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 170 (3d Cir.), cert. denied, 528 U.S. 1003 (1999). In such a case, it may be possible to find a legal theory shared by a majority of the Justices by looking to a combination of the plurality or concurring opinions and the dissent. See, *e.g.*, *Johnson*, 467 F.3d at 64-66. But where that inquiry also proves unavailing, then "the only binding aspect of [the] splintered decision is its specific result." *Anker Energy Corp.*, 177 F.3d at 170.

That is the situation with *Santos*. Although the plurality opinion suggests that Justice Stevens's concurring opinion rests on a narrower ground, 128 S. Ct. at 2031, neither Justice Stevens's opinion nor the plurality opinion is a "logical subset" of the other. The plurality opinion rests on the rationale that "proceeds" has a single meaning for all SUAs, and that meaning is "profits." See *id.* at 2029-2030. Justice Stevens's opinion is based on the rationale that "proceeds" has a different meaning for different SUAs. *Id.* at 2033. Neither opinion is a logical subset of the other or can provide a common denominator because they rest on inconsistent premises. Similarly, neither opinion can be combined with the reasoning of the dissent to generate a controlling legal principle because the dissent concludes that "proceeds" always means "gross receipts." *Id.* at 2044. The dissent thus rejects both Justice Stevens's premise that "proceeds" has different meanings for different SUAs and the plurality's conclusion that "proceeds" means "prof-

its." See *ibid.* Accordingly, the only binding aspect of the *Santos* decision is its specific result, which does not address the circumstances of petitioner's case.

c. Even if the "profits" requirement applied in this case, petitioner's challenge to his conviction based on *Santos* would lack merit. In *Santos*, the charged financial transactions consisted of payments of winning bettors and runners' salaries using the proceeds of an illegal lottery operation. Members of the Court adopted the "profits" definition of "proceeds" in order to avoid the result whereby the payment of such "normal" or "essential" expenses of a gambling business would constitute money laundering. 128 S. Ct. at 2027 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Those Justices were concerned that, if the money laundering statute covered paying the essential expenses of the underlying crime, then the money laundering charge would merge with the proceeds-generating crime, so that a separate conviction for money laundering would be tantamount to a second conviction for the same offense. *Id.* at 2026-2027 (plurality opinion); *id.* at 2032-2033 (Stevens, J., concurring in the judgment).

This case does not present the merger problem that concerned the Court in *Santos* because several of the transactions underlying the money laundering charges against petitioner did not involve the payment of essential expenses of the fraudulent scheme. As petitioner notes, some of the promotion transactions involved the payment of "utilities and taxes." Pet. 5. Such expenditures, unlike, for example, the cost of producing and mailing the fraudulent solicitations, were not "essential" expenses of the fraud operation. Similarly, some of the concealment transactions did not involve expense pay-

ments at all, but rather the movement of funds between accounts to generate the appearance of fictitious loans or deposits into and withdrawals from the fictitious "A-O Trust." See Pet. App. 18-19 & n.4; pp. 4-5, *supra*. Accordingly, petitioner errs in contending (Pet. 8) that the transactions, by definition, cannot qualify as transactions in "profits" under *Santos*.

Petitioner does not contend that his fraudulent scheme was not profitable, and ample evidence indicates that it was. The scheme lasted for five years and took in more than $6.6 million dollars yet had only limited expenses. See Pet. App. 14-19. Furthermore, the illegal business expanded over that five-year period as the proceeds were reinvested, "generating still more illegal proceeds." *Id.* at 18. And the proceeds of the business were routinely diverted to the personal use of petitioner and his family, which could not have occurred if the receipts were completely consumed by the scheme's expenses. See *id.* at 18 & n.4; pp. 3-4, *supra*. Accordingly, petitioner's challenge to his conviction based on *Santos* is unavailing.

2. Petitioner's *Santos*-based challenge to his sentence likewise lacks merit. Petitioner also failed to preserve that claim for this Court's review. The 2000 version of the Sentencing Guidelines was applied here, and, for money laundering, it provided for an enhancement to petitioner's base offense level based on the "value of the funds" involved in the offense if that figure exceeded $100,000. Sentencing Guidelines § 2S1.1(b)(2). On appeal, petitioner contended that the district court erred in calculating the "value of the funds" because the court counted all the money fraudulently obtained by the company instead of only the amount of money that was actually laundered. He argued that a considerable amount

of the company's receipts were not laundered because they were "used legitimately by the company." Pet. App. 2. Petitioner did not argue that the company's receipts were not laundered because the money laundering statute, by using the term "proceeds," prohibits only the laundering of "profits." Accordingly, petitioner failed to preserve his present claim based on *Santos*.

In any event, in rejecting petitioner's challenge to his sentence, the court of appeals noted that "the [district] court was required to determine the 'value of the funds,' not the amount of 'laundered funds.'" Pet. App. 6; see Sentencing Guidelines § 2S1.1(b)(2) (2000). The court held that the "value of the funds" involved in the offense includes "the total amount of funds * * * involved in the course of criminal conduct." Pet. App. 4 (quoting *United States* v. *Barrios*, 993 F.2d 1522, 1524 (11th Cir. 1993)). Applying that test, the court of appeals did not limit its consideration to funds involved in the unlawful transactions. Thus, even if petitioner had used some of the fraudulently obtained money to engage in financial transactions that did not constitute money laundering under *Santos*, the court of appeals would have concluded that the money was properly counted in calculating the "value of the funds," and it would have rejected petitioner's challenge to his sentence. In this Court, petitioner has not challenged the Eleventh Circuit's interpretation of the term "value of the funds" in the 2000 version of the guideline.*

---

* Effective November 1, 2001, the Sentencing Commission amended Sentencing Guidelines § 2S1.1 to change the method for determining the offense level for money laundering, and, in so doing, the Commission eliminated the term "value of the funds." See Sentencing Guidelines App. C, amend. 634. Under the current Guidelines, the base offense level for money laundering is determined using the offense level

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

NOVEMBER 2008

---

for the underlying offense from which the laundered funds were derived, or, in some circumstances, by reference to a chart in § 2B1.1 corresponding to "the value of the laundered funds." Sentencing Guidelines § 2S1.1(a). The term "laundered funds" is defined as "the property, funds, or monetary instrument involved in the * * * financial transaction * * * in violation of 18 U.S.C. § 1956." *Id.* § 2S1.1, comment. (n.1). The question of how to construe the term "value of the funds" in the 2000 version of the money laundering guideline is therefore of negligible continuing importance.